Supreme Court, U.S.
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No. 92-637

In The

Supreme Court of the United States

October Term, 1992

MUTUAL REINSURANCE BUREAU,

Petitioner,

v.

GREAT PLAINS MUTUAL INSURANCE COMPANY, INC.,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT

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ARGUMENT

Petitioner asserts two reasons why a writ of certiorari should be granted: (1) a conflict between circuits, and (2) an important question of federal law which should be settled by this Court.

I. There Is No Conflict Between Circuits

Petitioner argues there is a conflict between the holding of the Second Circuit in *Hamilton Life Ins. Co. of New York v. Republic National Life Ins. Co.*, 408 F.2d 606 (2d Cir. 1969) and the holding of Tenth Circuit in the case at bar. Petitioner argues both circuits construed state arbitration statutes barring arbitration of insurance contracts and reached different conclusions. This is a misstatement of the law. In fact, the Texas statute construed in *Hamilton* did not mention insurance but simply governed arbitration in general, while on the other hand the Kansas statute construed in this case (K.S.A. 5-401) specifically bars arbitration of contracts of insurance. This difference was clearly noted by both the district court and the Tenth Circuit.

In its decision the district court stated:

> K.S.A. 5-401 differs from the arbitration statutes considered in *Hart, Hamilton* and *Miller* in that it appears that none of the arbitration statutes considered in those cases contained the phrase "contracts of insurance." K.S.A. 5-401 specifically prevents arbitration of "contracts of insurance." . . .

> . . . *Therefore, the district court in Hamilton did not confront the precise issue at bar* . . . (emphasis added) (Pet. App. 23-24)

In its opinion the Tenth Circuit also noted the difference:

> The version of K.S.A. 5-401 in effect at the time the reinsurance agreement was executed provided:
>
> > Validity of arbitration agreement. A written agreement to submit any existing controversy to arbitration or a provision in a written contract, *other than a contract of insurance* . . . , to submit to arbitration any controversy other than a claim in tort, thereafter arising between the parties is valid, enforceable and irrevocable . . . (emphasis in original)

The district court relied on our earlier decision in *Hart v. Orion Ins. Co.*, 453 F.2d 1358 (10th Cir.), as well as the Second Circuit's decision in *Hamilton Life Ins. Co. of N.Y. v. Republic Natl. Life Ins. Co.*, 408 F.2d 606 (2nd Cir.), for the proposition that state arbitration laws are not laws regulating the "business of insurance." The court then held that K.S.A. 5-401 was a law governing arbitration generally and not a law regulating the "business of insurance." *The statutes at issue in Hart and Hamilton differ from K.S.A. 5-401 in one very important respect in that those statutes governed arbitration in general and did not mention "contracts of insurance."* The trial court noted as to *Hart* that the statute there considered did not contain the exception "contracts of insurance," but apparently concluded that made no difference. Section 5-401 as it now exists expressly

> excludes contracts of insurance from arbitration *and therefore it is not comparable to the statutes in Hart and Hamilton.* (emphasis added) (Pet. App. 6, 9)

Because the Second and Tenth Circuits did not consider similar state arbitration statutes their holdings cannot be in conflict. The Tenth Circuit's opinion herein will not cause an increase in costs for the insurance industry or consumers because of coverage disputes between insurers and reinsurers as the Tenth Circuit's holding is clear and succinct as to the state statute before it and does not create uncertainty. When an asserted conflict in decisions does not arise from the application of a principle of law a writ of certiorari may be dismissed. *Wisconsin Elec. Co. v. Dumore Co.*, 282 U.S. 813, 75 L.Ed. 728, 51 S.Ct. 214 (1931).

II. There Is No New Question Of Federal Law

Petitioner suggests the decision of the Tenth Circuit in this case, which is that K.S.A. 5-401 is a statute which regulates the business of insurance, may create inconsistency and confusion in applying the Federal Arbitration Act and this Court must therefore review the decision. This Court has previously addressed and answered this question in *SEC v. National Securities, Inc.*, 393 U.S. 453, 21 L.Ed.2d 668, 89 S.Ct. 564 (1969), *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 59 L.Ed. 2d 261, 99 S.Ct. 1067 (1979) and *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 73 L.Ed. 647, 102 S.Ct. 3002 (1982). In those cases the Court gave ample guidance to lower courts in determining whether any particular statute regulates the

"business of insurance" and the Tenth Circuit in this case specifically relied on and applied those cases:

> The McCarran-Ferguson Act does not define "business of insurance" either in its text or in its legislative history. We are guided, however, by a trilogy of Supreme Court cases construing the term.
>
> In the first of these three cases, *Securities and Exch. Comm'n v. National Sec.*, 393 U.S. 453, 460, the Supreme Court emphasized that the relationship between the insurer and insured was of paramount importance in determining what constitutes the "business of insurance." The Court said:
>
> > The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement – these were the core of the "business of insurance." Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was – it was on the relationship between the insurance company and the policyholder. Statutes aimed at protecting or regulating this relationship, directly or indirectly, are laws governing the "business of insurance."
>
> Later, in *Group Life & Health Ins. Co. v. Royal Drug*, 440 U.S. 205, the Court again emphasized that Congress, in passing the McCarran-Ferguson Act, was primarily concerned with the relationship between the insurer and insured.

The Court quoted from *National Securities* and noted that a common aspect of the "business of insurance" is the contract between the insurer and the insured.

The Court's most recent opinion dealing with the "business of insurance" is *Union Labor Life Ins. Co. v. Pireno,* 458 U.S. 119. After reviewing *National Securities* and *Royal Drug,* the Court identified three criteria relevant to determining whether a particular practice is part of the "business of insurance":

> First, whether the practice has the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry. None of these criteria is necessarily determinative in itself . . .

Reviewing K.S.A. 5-401 in light of the Supreme Court's decisions in *National Securities, Royal Drug,* and *Pireno,* we must conclude that K.S.A. 5-401 is a statute regulating the "business of insurance." We also conclude that this "business of insurance" includes reinsurance. (Pet. App. 7-8)

Petitioner is not requesting this Court to decide a new question of federal law. Petitioner is simply asking the Court to apply *National Securities, Royal Drug* and *Pireno* to this case and reach a different conclusion than the Tenth Circuit.

Petitioner also argues confusion and inconsistency may result from the fact the application of the Federal

Arbitration Act depends on the wording of the applicable state arbitration statute. However, the rule could not be otherwise. Congress has declared that regulation by the States of the business of insurance is in the public interest and whether a State elects to enact a law barring forced arbitration of insurance contracts is a matter of choice for the State. There will therefore be no uniform regulation among the several States and there will be no uniform rule as to whether the Federal Arbitration Act applies to insurance contracts in all states alike. Courts need only apply *National Securities, Royal Drug* and *Pireno* when considering whether any such statute was enacted for the purpose of regulating the business of insurance.

CONCLUSION

Because there is no conflict between circuits or undecided question of federal law Respondent requests the petition for writ of certiorari be denied.

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